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No. 09-1218

Supreme Court, U.S.
FILED
JUN 9 - 2010
OFFICE OF THE CLERK

In the

Supreme Court of the United States

CORLINE ALLEN, Individually and on behalf of all others similarly situated; ALL PLAINTIFFS; LORENZO ARGUIRRE; THEOTIS ANDERSON; GERARDO AVALOS, et al.,

Petitioners,

v.

MCWANE, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner's Questions I and II present any issue meriting review by this Court?

RULE 29.6 STATEMENT

McWane, Inc. has no parent corporation, nor does any publicly traded corporation own ten percent or more of its stock.

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STATEMENT

Under 29 U.S.C. § 203(o), the time spent changing clothes "is to be excluded from the measured working time if it has been excluded by custom or practice under a bona fide collective-bargaining agreement." *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 479 (5th Cir. 2001). The legislative history of § 203(o) affords a particularly helpful background here, as noted below and by the Eleventh Circuit in *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 957-58 (11th Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 2902, 171 L.Ed.2d 841 (2008). In 1947, shortly after the FLSA had been enacted to ensure the "well-being of workers," 29 U.S.C. § 202 (2000), Congress passed the Portal-to-Portal Act specifically to countermand judicial interpretations that Congress found to (i) evidence a "disregard of long-established customs, practices, and contracts between employers and employees," and (ii) "creat[e] wholly unexpected liabilities" upon employers. The FLSA was further amended two years later to add what is now § 203(o). The latter amendment was, according to its sponsor, intended to "avoid [] another series of incidents which led to the portal-to-portal legislation." 95 Cong. Rec. 11,433 (daily ed. Aug. 10, 1949) (comment of Rep. Herter). The amendment would, in short, strengthen the employer protective Portal-to-Portal Act. *Id.*

Ignoring this history, Allen would narrowly construct § 203(o). In a nutshell, she claims that

compensation for pre- and post-shift changing time is a pre-existing right under the FLSA, subject to exclusion only if it first has been affirmatively bargained away in union negotiations. According to Allen, moreover, there has been no acquiescence or waiver here – not because the unions did not know of McWane's longstanding policy of compensating employees on a "shift" or "line" time basis, thus excluding pre- and post-shift donning and doffing of basic protective gear – but because the union representatives purport not to have fully appreciated the set of legal rights that the FLSA afforded. Allen is decisively wrong on both accounts, for reasons articulated in the opinion below and earlier stated in decisions by the Third Circuit, in *Turner v. City of Philadelphia*, 262 F.3d 222, 225-26 (3d Cir. 2001), and by the Eleventh Circuit, in *Anderson*, 488 F.3d at 957-58.

Three circuits now have considered the specific question whether § 203(o) requires the employees and employers to have discussed the issue of compensation for pre- and post-shift changing time, where the collective bargaining agreement is silent on the issue, in order to find a custom or practice of nonpayment under a CBA. All three circuits have concluded that such a negotiation requirement would contradict the employer protective purpose of § 203(o). And all three circuits have acknowledged that a longstanding tradition of non-compensation such as McWane's forty-some year policy establishes the necessary custom or

practice. Allen's petition affords no reason to now disturb this consensus of holdings.

REASONS FOR DENYING WRIT

This Court should deny the Petition for Writ of Certiorari for at least the following five reasons:

- The conflicts Allen postulates are neither real nor compelling, but illusory and insubstantial.
- This Court has rejected opportunities to address Allen's positions, denying certiorari in *Anderson v. Cagle's, Inc.*, a quite similar case.
- Allen's petition invokes an inaccurate view of the facts.
- The procedural context would frustrate review: Whereas Allen would have the Court examine the burden of proof at trial, this case presents as a summary-judgment appeal.
- And, finally, § 203(o) was correctly applied below, consistent with fairness principles and the statute's employer-protective purposes.

There thus is no compelling reason to grant the Petition. *See* Sup. Ct. R. 10.

I. The Decision in this Case Embodies No Substantial Conflict, Let Alone a Compelling One.

A. The Conflict Among Circuits that Allen Postulates is Insubstantial, if Not Illusory.

As her first (and presumably strongest) reason for granting certiorari, Allen touts a conflict among the circuits "regarding the burden of proof to establish a 'custom or practice' under a collective bargaining agreement." Pet. at i. Allen's "conflict" does not conceivably embody any substantial dispute such as might afford a compelling reason to grant certiorari. For one thing, the Ninth Circuit's 2003 opinion in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003) – the supposedly conflicting decision – said nothing of the burden of proof under § 203(o) but rather determined that the donning and doffing at issue in *Alvarez* was not "changing clothes." *Id.* at 904-05. In explaining that conclusion, the Ninth Circuit cited the non-controversial principle that FLSA *exemptions* are construed narrowly against the employer, via this two-sentence observation:

> FLSA exemptions . . . "are to be narrowly construed against the employers seeking to assert them." [citations omitted] . . . [W]e have also read FLSA exemptions – such as § 3(o) – tightly, refusing to apply FLSA exemptions "except [in contexts] *plainly and unmistakably* within the[ ] [given exemption's]

> terms and spirit." [citations omitted]. *Id.* at 905 (emphasis supplied by the *Alvarez* court).

This brief observation, which is Allen's sole basis for asserting a conflict among circuits, hardly suggests any substantial issue respecting the burden of proof under § 203(o). It is doubtful that the current decision – interpreting the 'custom or practice' proviso of § 203(o) – and the analysis of the Ninth Circuit – addressed to the distinct 'clothes-changing' term – could even be counted as in conflict. In fact, the latter analysis is so tangential to this case that Allen herself never bothered to cite it when urging the court of appeals "to characterize § 203(o) as an exemption" and "affirmative defense." *See* App. at 18 (noting Allen's reliance on the district court ruling in *Kassa v. Kerry, Inc.*). Similarly, the courts citing the Ninth Circuit's *Alvarez* decision (one state court and four federal district courts) do so merely for the generalized proposition that FLSA *exemptions* are construed narrowly.[1]

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[1] *See Weaver v. City & County of San Francisco*, 2004 WL 422626, *4 (N.D. Cal., Mar. 4, 2004) (applying FLSA's §207 overtime exemption), *rev'd*, 158 Fed. Appx. 921 (2005); *Ruggeri v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 585 F.Supp.2d 308, 317 (D. Conn. 2008) (construing "outside salesman" exemptions of FLSA and California Labor Code); *McLaughlin v. Nationwide Mut. Ins. Co.*, 2004 WL 1857112, *2 (D. Or. Aug. 18, 2004) (applying FLSA exemption for persons "employed in a bona fide . . . administrative . . . capacity" 29 U.S.C. §213(a)(1)); *Peterson v. Snodgrass*, 683 F.Supp.2d 1107, 1123 (D. Or. 2010) (applying

(Continued on following page)

Nor is the clothes-changing issue that *Alvarez* addresses otherwise relevant. Both sides in this case agree the donning and doffing of protective gear at McWane's facilities does in fact constitute "changing clothes." *See* Pet. at 6 n. 4.

And while the Fifth Circuit characterizes the quoted sentences from *Alvarez* as "hold[ing] §203(o) to be an exemption," App. at 18, that seems far too charitable in retrospect. In *Alvarez*, the Ninth Circuit appears simply to have *assumed* Section 203(o) to be an exemption, without contemplating any other interpretive possibility or bringing any analysis to bear upon the matter. *See* 339 F.3d at 905.

Perhaps most important, the three courts to address the issue head on, the Third, Fifth and Eleventh Circuits, have all spoken with one voice, concluding that § 203(o) is a definition/exception. *Anderson*, 488 F.3d at 957-58; *Turner*, 262 F.3d at 225-26; App. at 18-20. Given the combined light of these decisions, the possibility that the Ninth Circuit's *Alvarez* decision actually might influence a future court to incorrectly apply § 203(o) is a most unlikely proposition.

FLSA exemption for persons "employed in a bona fide . . . administrative . . . capacity" 29 U.S.C. §213(a)(1); *Cerrillo v Esparza*, 109 P.3d 475, 477 (Wash. App. 2005) (applying Washington Minimum Wage Act), *rev'd*, 142 P.3d 155 (Wash. 2006).

The Court has frequently denied certiorari even in the face of genuine conflict in the Circuits. *See, e.g. Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990) (White, J., dissenting) (noting 48 instances where petitions based on circuit splits had been denied in the then-current term). This case, which does not suggest any such conflict, is not worthy of further review.

B. The Fifth Circuit's Decision Does Not Conflict with any Decision of this Court.

While Allen contends that the court of appeals "abolished" the knowledge and acquiescence elements of a custom or practice under a CBA, the court did just the opposite. First it noted with approval that Allen's cited authority, *Kassa v. Kerry, Inc.*, "identified three elements as essential to determine the existence of a 'custom or practice' under § 203(o): time, knowledge, and acquiescence." App. at 14. It further cited this Court's decision in *Detroit & Toledo Shore Line Railroad Company v. United Transportation Union*, 396 U.S. 142, 154 (1969). *Id.* Then, it explained that a policy of non-compensation for changing time that has been in effect for a prolonged period can of itself establish "that the union had knowledge of and acquiesced to the employer's policy," whereas in the absence of such a policy "other evidence of knowledge and acquiescence by the employees will be

required." App. at 16; *accord* App. at 17 n. 4 (noting that "a 'custom,' [as opposed to a practice] in and of itself, demonstrates acquiescence").

Applying this law, the court then held that the union in this case knew of and acquiesced in McWane's longstanding policy of non-compensation:

> It is undisputed that McWane has never compensated its employees for changing time, going as far back as 1965. After more than forty years of non-compensation, we may safely infer that McWane's employees had knowledge of and acquiesced to the policy of non-compensation. Therefore, we conclude that McWane has demonstrated a 'custom' of non-compensation for changing time. App. at 17.

See also App. at 20 ("While evidence of the employees and their union representatives' ignorance of the fact of non-compensation could create a genuine issue of material fact, no such evidence has been proffered by Allen."). Allen, in contrast, all but ignores Petitioners' knowledge of McWane's policy, choosing instead to highlight their allegedly imperfect knowledge of their FLSA rights. *E.g.*, Pet. at 5 (averring that this Court's decision in *Alvarez* gave Plaintiffs notice that certain preliminary and postliminary activities may be compensable as part of the FLSA continuous workday). Knowledge of the law is not, nor can it be, the standard. To hold otherwise would be tantamount to saying that plaintiffs need not press their rights unless

and until those rights are definitively settled in this Court.

Allen alternately proposes that this Court's own decision in *IBP, Inc. v. Alvarez*, which addressed the contours of the compensable workday, should excuse Petitioners from the consequences of § 203(o). Pet. at 9. In *Alvarez*, however, this Court did not apply § 203(o) but principally determined that time spent by meat packing workers in walking between locker rooms and production lines after donning specialized protective gear was within FLSA compensable time. 546 U.S. 21, 32-33 (2005). That neither interrupts McWane's forty-year custom of nonpayment nor excuses Allen from its consequences.

II. This Court Denied Certiorari in an Almost Identical Case.

This Court has denied certiorari in *Anderson v. Cagle's, Inc.*, an almost identical case. *See Anderson*, 488 F.3d 945 (11th Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 2902, 171 L.Ed.2d 841 (2008). Both cases not only litigated claims to be paid for time spent donning and doffing protective clothes but also rejected arguments that a § 203(o) custom or practice could not arise absent express negotiation in collective bargaining. *Id.* at 958-59. Both cases further rejected identical arguments respecting the burden of proof under § 203(o). *Id.* at 957. And both cases were summary-judgment appeals. *See id.* at 949.

In the time since the denial of certiorari in *Anderson*, there has been no change in relevant law. The decision in this case clearly blazes no new analytical trail. Thus there is no reason for now choosing review when it appropriately was withheld in *Anderson*. The petition could and should be denied for this reason alone.

III. Allen's Petition Invokes an Inaccurate View of the Facts.

The hypothetical "molten metal pourer" of Allen's petition (Pet. at 21) is in fact paid for donning and doffing any specialized items of protective gear such as "face shields, aprons and flame-resistant aluminum-clad clothing," as are all other workers whom McWane requires to don and doff such specialized items. *Cf.* Pet. at 5. And as concerns the donning and doffing of basic protective gear (items such as hard hats, safety goggles, gloves and steel-toed boots), the workers and their union representatives always have known that McWane did not compensate this activity and have acquiesced in this policy. *Cf.* Pet. at 12. That the unions and workers had this knowledge is apparent from the nature of shift or line time, precisely as noted in the appellate court's opinion, App. at 3, and never disputed by Allen. What was not known, in contrast, was only whether, but for the § 203(o) exception, the FLSA otherwise would have required McWane to compensate the latter donning and doffing.

IV. This Case Lacks the Procedural Context Necessary for Addressing the Burden of Proof at Trial.

As discussed, Allen principally disputes the burden of proof at trial. Pet. at 11 (arguing that Section 203(o)'s status as an exception or exemption determines whether "the employee petitioners must carry [the] burden of proof at trial on the labor/management understandings"). Had there been any substantial conflict respecting that burden, this summary-judgment appeal would be ill-suited for addressing it.

Once McWane demonstrated its longstanding policy of non-compensation, the burden fell to Allen (both in opposing summary judgment and on appeal) to then demonstrate a genuine issue of material fact as to whether a "custom or practice under a bona fide collective bargaining agreement" existed – regardless who might bear the burden of proof at a conventional trial. Fed R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Adams v. U.S.*, 471 F.3d 1321, 1326 (Fed. Cir. 2006) (FLSA suit; rejecting the argument that summary judgment to the government was improper because the government produced minimal evidence), *cert. denied*, 552 U.S. 1096 (2008). And being as it is "undisputed that McWane has never compensated its employees for changing time, going as far back as 1965," App. at 17, there simply is no room for any genuine issue of material fact as to whether "McWane's employees had knowledge of and acquiesced to the policy of non-compensation." *Id.*

V. The Courts Below Correctly Decided the Issues.

Rather than raise a genuine issue of material fact, Allen proposes that the requisite "custom or practice" be found not to exist absent express negotiation. This interprets the statutory text much too narrowly, to the point of virtually reading the clause 'custom or practice' out of § 203(o). In essence, Allen construes 'custom or practice under a bona fide collective-bargaining agreement' as 'custom or practice established through formal collective bargaining negotiations.' To the contrary, the phrase "simply restat[es] the well-established principle of labor law that a particular custom or practice can become an implied term of a labor agreement through a prolonged period of acquiescence." *Turner*, 262 F.3d at 226, citing *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 153-54, 90 S.Ct. 294, 24 L.Ed.2d 325 (1969).

Upon just such reasoning, the Third, Fifth, and Eleventh Circuits all expressly hold that express negotiation is not necessary in the face of a long-standing policy of non-compensation. *See Turner*, 262 F.3d at 225-26; *Anderson*, 488 F.3d at 958-59, App. at 17. This consensus interpretation comports with common usage of the words 'custom and practice,' which is denoted by "common adoption and acquiescence," Black's Law Dictionary 347 (5th ed. 1979), and rightly encompasses any "habitual or usual practice" or "established usage which by long continuance has acquired the force of law or right." Oxford English

Dictionary 577 (thumb index ed. 1993); *see Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 565 (E.D. Tex. 2001) (employer's "long-standing policy of noncompensation" of itself "constitutes a 'custom' for purposes of § 203(o)") (citing *Arcadi v. Nestle Food Corp.*, 38 F.3d 672, 674-75 (2d Cir. 1994)).[7] The consensus interpretation also comports with Congress's intention that § 203(o) would safeguard the fair expectations of employers in respect of employee compensation. *See Anderson*, 488 F.3d at 957-58.

Insofar as the burden of proof at trial is concerned, if that could be relevant in this summary-judgment case, the Fifth Circuit's decision again embodies the consensus view, supported by the statutory text. Section 203(o) "is a list of definitions and subsection (o) addresses how to define and calculate 'hours worked,' in contrast to § 213, which is titled 'Exemptions.'" App. at 18. In contrast, the "exemptions" this Court refers to as affirmative defenses to the FLSA all "relate[ ] to the total exclusion of a particular worker or workers from certain FLSA protections[,]" not "to the exclusion of only some activities from FLSA." *Id.*, quoting *Adams v. United States*, 471 F.3d

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[7] A "practice," as contrasted from a custom, can sometimes include prospective policies when they are established by express negotiations (as where a provision in a prior collective bargaining agreement affording compensation for change time is deleted from the parties' new CBA). *Arcadi v. Nestle Food Corp.*, 38 F.3d 672, 674-75 (2d Cir. 1994).

1321, 1325-26 (Fed. Cir. 2006). And as the Eleventh Circuit has observed, if Congress had wished to enact § 203(o) as an exemption, with the same status as the exemptions in § 213, "it easily could have amended § 213 instead of § 203," which is titled "Definitions." *Anderson*, 488 F.3d at 957.

The decision in this case thus reflects an established and correct understanding of statutory intent. Reversing that decision would induce a most unfair result. As we have stated, through § 203(o) Congress sought to counter those judicial interpretations of the FLSA that had unfairly "disregard[ed] . . . long-established customs, practices, and contracts" thus inviting "windfall payments . . . for activities performed . . . without any expectation of reward beyond that included in their agreed rates of pay." 29 U.S.C. § 251. Allen's campaign to constrict § 203(o), which retroactively would invalidate any custom or practice not expressly bargained for, invites precisely those consequences. Indeed, Allen sets out to topple both sides' legitimate expectations for their collective bargaining agreements – agreements in which McWane's longstanding custom was an implicit term in light of which all other contract provisions were negotiated.

In sum, the parties were always free to negotiate for payment for donning and doffing. But following a decades-old custom, they willingly chose to negotiate respecting other terms.

CONCLUSION

The analysis of the Third, Fifth, and Eleventh Circuits is correct and adequately explained. The questions answered by this consensus of opinion are not close. Because Allen has not established any compelling reason for this Court to act otherwise, the petition for writ of certiorari should be denied.

Respectfully submitted,

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